Afad Sha Shd Bhd v SPPIK Dagang Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-1195-93
KAMALANATHAN RATNAM JC
20 MARCH 1996

Companies and Corporations *— Suit by company — Company not registered at commencement of suit — Whether judgment obtained by company a nullity — Whether plaintiff had locus standi in the suit*

Civil Procedure *— Judgments and orders — Judgment in default obtained by a non-existent company — Whether judgment obtained was a nullity — Whether there is a distinction between an order which is obtained irregularly and one which is a nullity — Whether writ of seizure and sale based on the default judgment ought to be struck out — Rules of the High Court 1980 O 2 r 1*

Civil Procedure *— Judgments and orders — Setting aside, application for — Whether bar against challenge of court order in collateral proceedings applicable — Whether court can exercise inherent jurisdiction to set aside judgment — Whether issue of locus standi must be considered — Rules of the High Court 1980 O 92 r 4*

The plaintiff sued the defendants based on an agency agreement for a sum of RM162,800 together with interests and costs. Contrary to what was stated in para 1 of its statement of claim, the plaintiff was not registered with the Registrar of Companies ('the ROC') at the time they filed their action and obtained judgments in default of appearance. However when the defendants applied to set aside the aforesaid judgments in default, they annexed a copy of their defence wherein they admitted to para 1 of the plaintiff's statement of claim which stated that the plaintiff was a private limited company incorporated in Malaysia. No issue was taken in respect of the non-existence of the plaintiff company at the time of the filing of the suit. The defendants' application to set aside the default judgments was rejected by the learned senior assistant registrar ('the SAR') and the defendants appealed to the judge in chambers against the said decision. The defendants also filed an application for a stay of proceedings. Here the affidavit in support of the application stated other points of merit and yet no issue was raised on the point that the plaintiff was not a registered company. When the appeal against the SAR's decision refusing to set aside the judgment in default was dismissed by the learned judge, the defendants filed another application to stay the execution of the judgments in default. In the affidavit in support of this application, it was averred for the first time that the plaintiff was not registered with the ROC at the time the suit was commenced. Meanwhile the plaintiff filed an ex parte application and obtained orders to garnish the accounts of the defendants. The defendants then filed an application to set aside the said orders. After the decision on the said application was given, the defendants made the current application to strike out the writ of seizure and sale and in their affidavits the defendants reiterated the same arguments referred to in the earlier proceedings and maintained that the plaintiff had no locus standi in this suit.

Held, allowing the application:

(1) In the present case, the plaintiff was not incorporated pursuant to s 16(5) of the Companies Act 1965 ('the Act') when the suit was filed and judgment taken. Since the judgment obtained by a non-existent company had formed the root of these present enforcement proceedings, such proceedings must naturally fail (see pp 107I–108A); see *Standard Chartered Bank v Central Provident Fund Board* [1989] 1 MLJ 268 followed.

(2) Since the judgment obtained was a nullity, it followed therefore that the writ of seizure and sale ought to be struck out and set aside (see pp 109I–110A).

(3) Section 23(6) of the Act which deals with suits continued by the new company could not apply because the plaintiff company had not been incorporated at the commencement of the suit (see p 102C–D).

(4) Since the judgment obtained was a nullity, then the filing of the defence in which the defendants had erroneously admitted the same could not be treated as an admission to be held against the defendants (see p 97H–I).

(5) There is no distinction between an order which is a nullity and an order which is irregular and curable under O 2 r 1(1) of the Rules of the High Court 1980 in respect of the enforcement of the orders as both orders may be enforced until they are set aside whether in proceedings instituted for that purpose itself or in collateral proceedings. However, such orders may also be set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without the person affected by the order resorting to proceedings specifically meant for that purpose (see 108A–B); *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 and *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 followed.

(6) The stricture regarding the challenge of proceedings or an order in collateral proceedings ought not to bind the defendants in this case when they faced a judgment which was a nullity. Judgments in default obtained by a non-existent company would clearly fall within the very few rare exceptions where an order of a High Court could be challenged in collateral proceedings (see p 109F); *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 distinguished.

(7) In cases involving the issue of nullity, where the proceedings itself or the judgment is to be impugned, the court need not concern itself with the issue of locus standi as the court's inherent power to set aside such proceedings and/or judgment ought to be adequate (see p 111C).

Per curiam:

Before s 35(1) of the Act can be successfully invoked, first the alleged 'contract or other transaction' must purport to have been entered

into 'by any person on behalf of a company prior to its formation'. Secondly, it is only after the first condition is satisfied that such a contract 'may be ratified by the company after its formation ...'. Thirdly, it is only if both those conditions are satisfied that such a contract upon such ratification is antedated to the date when it first purported to have been made (lihat ms 103E–F); *Cosmic Insurance Corp Ltd v Khoo Chiang Poh* [1981] 1 MLJ 61 followed.

[Bahasa Malaysia summary

Pihak plaintif telah mendakwa defendan berdasarkan satu perjanjian agensi untuk jumlah RM162,800 bersama faedah dan kos. Bertentangan dengan apa yang dinyatakan dalam perenggan 1 di dalam pernyataan tuntutan, pihak plaintif telah tidak didaftarkan dengan Pendaftar Syarikat ('PS') pada masa tindakan tersebut difailkan dan juga pada masa penghakiman ingkar kehadiran diperolehi. Walau bagaimanapun, ketika defendan memohon untuk mengetepikan penghakiman ingkar tersebut, mereka telah melampirkan satu salinan pembelaan mereka di mana mereka telah mengaku kepada perenggan 1 pernyataan tuntutan plaintif yang menyatakan bahawa plaintif adalah sebuah syarikat sendirian berhad yang diperbadankan di Malaysia. Tidak ada isu yang telah dikemukakan mengenai ketidakwujudan syarikat plaintif pada masa tindakan difailkan. Permohonan pihak defendan untuk mengetepikan penghakiman ignkar itu telah ditolak oleh penolong kanan pendaftar yang arif ('PKP tersebut') dan defendan telah merayu kepada hakim dalam kamar terhadap keputusan itu. Pihak defendan juga telah memfailkan permohonan untuk penggantungan prosiding. Di sini afidavit yang menyokong permohonan tersebut telah mengemukakan isu-isu yang berdasarkan merit tetapi isu bahawa plaintif adalah sebuah syarikat yang tidak berdaftar tidak ditimbulkan. Apabila rayuan terhadap keputusan PKP yang enggan menolak penghakiman ingkar tersebut telah ditolak oleh hakim yang bijaksana, maka pihak defendan telah memfailkan satu lagi permohonan untuk penggantungan perlaksanaan penghakiman ingkar itu. Di dalam afidavit menyokong permohonan tersebut, telah dinyatakan untuk kali pertamanya bahawa plaintif telah tidak didaftarkan dengan PS pada masa tindakan mereka dimulakan. Pada masa yang sama plaintif pula telah mefailkan permohonan ex parte dan telah mendapatkan perintah untuk menggarniskan akaun defendan. Pihak defendan kemudiannya telah membuat permohonan untuk mengetepikan perintah-perintah tersebut. Setelah keputusan kepada permohonan tersebut telah diberikan, pihak defendan telah membuat permohonan ini untuk membatalkan writ penyitaan dan penjualan dan di dalam afidavit mereka, defendan telah mengulangi hujahan yang sama yang merujuk kepada prosiding awalnya dan telah menegaskan bahawa plaintif tidak mempunyai locus standi dalam guaman ini.

Diputuskan, membenarkan permohonan tersebut:

(1) Di dalam kes ini, plaintif telah tidak ditubuhkan menurut s 16(5) Akta Syarikat 1965 ('Akta tersebut') apabila guaman ini difailkan dan penghakiman diberi. Oleh kerana penghakiman tersebut yang didapati oleh sesebuah syarikat yang tidak wujud merupakan dasar prosiding perlaksanaan ini, maka prosiding tersebut mestilah gagal (lihat ms 107I–108A); *Standard Chartered Bank v Central Provident Fund Board* [1989] 1 MLJ 268 diikut.

(2) Oleh kerana penghakiman yang didapati adalah terbatal, maka writ penyitaan dan penjualan harus dibatalkan dan diketepikan (lihat ms 109I–110A).

(3) Seksyen 23(6) Akta tersebut yang berkenaan dengan guaman yang disambungkan oleh syarikat yang baru, tidak terpakai kerana syarikat plaintif telah belum lagi diperbadankan pada permulaan guaman ini (lihat ms 102C–D).

(4) Oleh kerana penghakiman yang diperolehi adalah terbatal, maka pembelaan yang difailkan oleh defendan, di mana mereka telah mengaku kepada peryataan yang salah, tidak boleh dianggap sebagai satu pengakuan oleh pihak defendan (lihat ms 97H–I).

(5) Tidak terdapat apa-apa perbezaan di antara perintah yang terbatal dan perintah yang luar aturan dan yang boleh dibetulkan melalui A 2 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 berkenaan dengan perlaksanaan perintah-perintah tersebut oleh kerana kedua-dua perintah tersebut boleh dilaksanakan sehingga ianya diketepikan sama ada dalam prosiding yang dijalankan untuk tujuan tersebut ataupun sama ada dalam prosiding kolateral. Walau bagaimanapun perintah-perintah tersebut boleh diketepikan *ex debito justitae* melalui bidang kuasa sedia ada mahkamah tanpa pihak yang terjejas oleh perintah itu menggunakan prosiding yang dikhaskan untuk tujuan tersebut (lihat ms 108A–B); *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 dan *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 diikut.

(6) Halangan berkenaan dengan cabaran terhadap prosiding atau sesuatu perintah di dalam prosiding kolateral tidak patut mengikat defendan di dalam kes ini apabila mereka bersemuka dengan satu penghakiman yang terbatal. Penghakiman ingkar yang diperolehi oleh sebuah syarikat yang tidak wujud jelasnya termasuk dalam lingkungan beberapa kecualian yang jarang wujud di mana suatu perintah sebuah Mahkamah Tinggi boleh dicabar di dalam prosiding kolateral (lihat ms 109F); *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 dibeza.

(7) Di dalam kes-kes yang melibatkan isu pembatalan, di mana prosiding itu sendirinya atau penghakiman dicabar, mahkamah tidak perlu mempertimbangkan isu locus standi kerana bidang kuasa sedia ada mahkamah untuk mengetepikan prosiding dan/ atau penghakiman sedemikian seharusnya mencukupi (lihat ms 111C).

Per curiam:

Sebelum s 35(1) Akta tersebut boleh dipakai, pertamanya 'kontrak atau urusan yang lain itu' haruslah kononnya dimasuki 'oleh mana-mana orang bagi pihak syarikat sebelum pemerbadanannya'. Keduanya, hanya setelah syarat yang pertama dipenuhi, barulah kontrak tersebut 'boleh diratifikasikan oleh syarikat tersebut selepas pemerbadanannya ...'. Ketiganya, hanya setelah kedua-dua syarat ini dipenuhi, barulah kontrak yang diratifikasi boleh diberikan tarikh yang lebih awal kepada tarikh apabila kontrak itu dikatakan telah dibuat pada mulanya (lihat ms 103E–F); *Cosmic Insurance Corp Ltd v Khoo Chiang Poh* [1981] 1 MLJ 61 diikut.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 AMR 2559 (refd)
Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd [1989] 3 MLJ 40 (distd)
Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khiun Fui [1978] 2 MLJ 24 (refd)
Cosmic Insurance Corp Ltd v Khoo Chiang Poh [1981] 1 MLJ 61 (refd)
Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor & another appeal [1995] 3 MLJ 472 (distd)
Hadkinson v Hadkinson [1952] 2 All ER 567 (refd)
Harkness v Bell's Asbestos & Engineering Ltd [1966] 3 All ER 843 (refd)
Hongkong & Shanghai Banking Corp v Goh Su Liat (Telecommunication Authority of Singapore, Garnishee) [1986] 2 MLJ 86 (folld)
Isaacs v Robertson [1984] 3 All ER 140 (refd)
Kelner v Baxter (1866) LR 2 CP 174 (refd)
MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100 (folld)
Pritchard, Re [1963] 1 All ER 873 (refd)
Russian & English Bank v Baring Brothers & Co Ltd [1935] Ch 120 (folld)
Standard Chartered Bank v Central Provident Fund Board [1989] 1 MLJ 268 (folld)
Tengku Jaffar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 159 (folld)

Legislation referred to

Companies Act 1965 ss 16, 23, 35
Rules of the High Court O 2, O 47, O 49, O 92

SP Selvasekaran (*Husin Selva & Partners*) for the applicant.
Faiz bin Fadzil (*Wahab Rashid & Co*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam JC: This was an application by the second defendant (encl 59) to strike out and to set aside a writ of seizure and sale

taken out by the plaintiff against both the defendants. The application was filed on 16 December 1995 together with a certificate of urgency and was fixed for hearing before me on 20 December 1995. However, the plaintiff's solicitors requested an adjournment to enable them to file an affidavit in reply. The matter was then adjourned to 27 December 1995.

When the matter came up before me again on 27 December 1995 the second defendant's counsel informed me that he was served with the plaintiff's reply (enclo 63) the day before but that because of the urgency of the matter, since the writ of seizure and sale was to be executed on 29 December 1995, he was prepared to argue the application without asking for further time to reply.

FACTS RELATING TO THIS CASE

The plaintiff, Afad Sha Sdn Bhd, sued both defendants on 22 October 1993 based on an agency agreement for a sum of RM162,800 with interest and costs.

The plaintiff prefaced their statement of claim with the first paragraph stating as follows:

> 1 Plaintif adalah sebuah syarikat sendirian berhad yang ditubuhkan di Malaysia dan mempunyai alamat perniagaan berdaftar di No 2006–1A Jalan Sentul Dalam, 51000 Kuala Lumpur.

As events would subsequently unfold, this was a totally misleading averment as the plaintiff was never so registered at the time of filing this action and the judgment in default being taken. The plaintiff obtained judgment in default of appearance against the first defendant on 30 November 1993 and against the second defendant on 26 November 1993.

On 25 April 1994, both defendants then jointly applied to set aside the respective judgments in default (encl 13). In their affidavit in support of encl 13, the defendants annexed a copy of their defence which they had filed on 21 December 1993 without knowing that judgment in default had already been obtained against them. In that defence both defendants admitted to para 1 of the statement of claim. The affidavit merely dealt with the merits and the fact that the agency agreement was unstamped, but no issue was taken in respect of the non-existence of the plaintiff company at the time of filing this suit. The learned senior assistant registrar ('the SAR') dismissed encl 13 on 16 August 1994 and the defendants then, vide encl 16A, appealed to the judge in chambers against the said decision.

After having filed the said notice of appeal the defendants also filed an application (encl 19) for a stay of proceedings until further order. In their affidavit in support of encl 19 the defendants averred that the plaintiff had issued out a writ of seizure and sale No 37–40–94 with a view to executing the judgments in default obtained against both the defendants. However, the parties entered into some negotiations and a sum of RM35,000 was deposited with the defendants' solicitors to be payable within a month to the plaintiff if the second defendant failed to set aside the judgment in default. Again the affidavit in support of encl 19 for stay

stated other points of merits but no issue was yet raised that the plaintiff was not a registered company. A

The learned SAR who heard encl 19 allowed the stay on 12 October 1994 and the plaintiff being dissatisfied, appealed to the judge in chambers on 17 October 1994 (encl 24).

In the meantime, encl 16A, which was the appeal against the learned SAR's decision refusing to set aside the judgment in default against both defendants, was heard by the learned judge, Abdul Malek Ahmad J (as his Lordship then was) in chambers on 8 February 1995 and having taken time to deliberate, the learned judge dismissed the defendants' appeal with costs on 16 March 1995. That being the case, the plaintiff's solicitor sought to withdraw encl 24 which was fixed for hearing on the same day on the ground that the matter was academic since the learned judge had dismissed the appeal. The learned judge took time to consider and on 20 March 1995, the learned judge struck out encl 24 and ordered both parties to bear their own costs. B C

On 3 April 1995, the relentless defendants filed yet another application (encl 30) identical in terms to encl 19 to stay execution of the judgments in default again. However in the affidavit in support of encl 30 (encl 29) the deponent, one Haji Ramli bin Abdul Ghani, who was at all material times both the director of the first defendant and general manager of the second defendant, averred for the first time that their solicitors' search at the Registrar of Companies ('the ROC') disclosed that the plaintiff was not registered with the ROC at the time the suit was commenced. However at all material times one Afad Sdn Bhd was the registered company. The deponent thus affirmed that the present plaintiff had no locus standi in this suit. He then contended that this constituted special circumstances for the court to grant a stay. Enclosure 30 was set for hearing on 17 April 1995. D E F

In the meantime the plaintiff filed an ex parte application (encl 35) to garnish the accounts of the defendants with Bank Bumiputra Malaysia Bhd and with the defendants' solicitors. In support of his certificate of urgency to obtain a garnishee order to show cause, the plaintiff's solicitor, Mr SP Selvasekaran ('Mr Selva'), inter alia, stated that on 17 May 1995 the Court of Appeal had dismissed the defendants' application for leave to appeal to the Court of Appeal against Abdul Malek Ahmad J's decision on 16 March 1995. Enclosure 35 was fixed for hearing on 26 May 1995. Having obtained the order sought, Mr Selva then personally served the order dated 26 May 1995 on both the garnishees as averred by him in his affidavit of service affirmed on 21 June 1995. G H

The garnishee order to show cause was heard by the SAR on 23 June 1995 and the decision was given on 24 June 1995. The garnishee order against the first garnishee was made absolute and as against the second garnishee, an order was made pursuant to O 49 r 5 of the Rules of the High Court 1980 ('the RHC 1980') that is, that the judgment creditor and the second garnishee be made plaintiff and defendant respectively to decide on the issue as to whether there was any debt due or accruing if any and the amount, from the judgment debtor to the garnishee, and as to what I

amount, if any, was to be paid into the second garnishee's account by the defendants in the main suit.

After the decision was given by the learned SAR, one Abdul Fatah bin Mohd Amin, a director of the first defendant and executive director of the second defendant affirmed an affidavit (encl 41) similar to that in encl 29 in support of encl 35 and also exhibited the same documents obtained from the ROC, as that in encl 29. The search disclosed that Afad Sdn Bhd was registered on 31 March 1983. However on 22 May 1995 an extraordinary general meeting of Afad Sdn Bhd was held wherein a resolution was passed to change the name of Afad Sdn Bhd to 'Afad Sha Sdn Bhd' and on 24 May 1995 the ROC approved the change, some 19 months after the commencement of this suit. Abdul Fatah questioned the plaintiff's motive for the sudden change in name.

The defendants then by way of encl 44 filed an application to set aside the garnishee order to show cause, the garnishee order absolute dated 24 June 1995 and the order dated 24 June 1995 for the determination of debt between the second garnishee and the judgment debtor on 27 June 1995. The plaintiff challenged encl 44 on the basis that there ought to have been an appeal to the judge in chambers and that this procedure to apply to set aside was wrong in law. This challenge was made by way of an application (encl 48) to strike out encl 44 and for a further order that the plaintiff be exempted from filing an affidavit in reply to encl 44.

On 10 August 1995 Abdul Malek Ahmad J heard arguments regarding encls 30, 44 and 48 and gave his decision on 4 October 1995. After the decision on 4 October 1995, the defendant made the instant application before me to strike out the writ of seizure and sale no 37–93–95 (encl 59). The affidavit of the defendants (encl 58) reiterated the same arguments referred to in the earlier proceedings and maintained the defendants' stand that the plaintiff had no locus standi in this suit. The defendants then urged this court to exercise its inherent powers to prevent the plaintiff from abusing the process of the court. The defendants also contended that the present plaintiff had been guilty of misrepresentation in that it had held itself out as a registered company when it was not at the material time.

The plaintiff through its director, Dr NA Akbar Shah bin Abdul Rahman, affirmed an affidavit in reply (encl 63) contending that this court had no power to grant the order prayed for in encl 59. The said deponent gave notice through the said affidavit that he intended to rely on all applications, affidavits, judgments and orders and other related documents in respect of this case filed in court, in support of his affidavit. It was the contention of the plaintiff that in the defendants' earlier application to set aside the judgment in default, they had not raised the issue that the plaintiff was not an incorporated body at the time the suit was filed. The plaintiff also exhibited the proposed defence wherein in respect of para 1 of the statement of claim, the defendants had admitted that the plaintiff was a private limited company at the material time. On this issue I hold that if this court finds that the judgment obtained was a nullity then the filing of the defence in which the defendants had erroneously admitted the same cannot be treated as an admission to be held against the defendants. The deponent, whilst confirming that Abdul Malek Ahmad J had on 4 October 1995 dismissed the defendants' application (encl 30), had failed

to state that the learned judge had dismissed encl 30 without deciding the merits of the application and that his Lordship had dismissed it on the ground that since the Court of Appeal had refused to grant leave to appeal there was therefore no need to consider a stay. This issue raised its serpentine head again when the plaintiff's counsel began submitting that the matter was res judicata. I shall revert to that later.

In any event, the deponent contended that even if the plaintiff was not a registered company at the commencement of this suit, s 35 of the Companies Act 1965 ('the Act') gave it a right to ratify all pre-incorporation acts.

It is to this affidavit that the defendants stated that they could not reply due to constraints of time as the execution proceedings were due and they could not take the chance of adjourning in order to affirm a reply.

By consent Mr Selva agreed to submit first on the preliminary issues of res judicata and estoppel because if the court was with him on those twin issues then there would be no need for the court to hear further arguments.

PLAINTIFF'S PRELIMINARY SUBMISSION

Res judicata

Mr Selva submitted that the fact that the plaintiff was not registered at the time of filing of this suit was fully argued before Abdul Malek Ahmad J and that although full submissions were made in respect of this for the first time whilst arguing the defendants' second application for stay (encl 30), the learned judge refused to grant an order in terms of the said application.

In the light of the submissions made before me and Mr Selva's reliance on res judicata it became necessary for me to have the notes of evidence of the proceedings before Abdul Malek bin Hj Ahmad J which was certified by his secretary. I reproduce herewith the transcript of Abdul Malek Ahmad J's notes when he gave his decision on 4 October 1995:

> 4 Oktober 1995 DALAM KAMAR
>
> Mahkamah:
>
> Mahkamah telah meneliti perkara ini dan berpendapat bahawa oleh kerana rayuan ke Mahkamah Rayuan telah ditolak atas soal prosedur, tiada sebab untuk apa-apa penggantungan perlaksanaan diberi. Oleh itu, permohonan di kandungan 30 ditolak dengan kos. Mengenai kandungan 44, ianya sepatutnya didengar di hadapan penolong kanan pendaftar dan oleh kerana ini disebabkan oleh kesilapan mahkamah sendiri, mahkamah menghantarkannya ke penolong kanan pendaftar untuk didengar pada tarikh yang akan ditetapkan sungguhpun hujahan telah dibuat di hadapan hakim. Tiada perintah kos. Dalam keadaan demikian, kandungan 48 hendaklah ditolak tanpa perintah kos.
>
> En Selva:
>
> (1) matters had been heard before senior assistant registrar but he did not give decision against second garnishee;
> (2) he remitted the matter to the judge;
> (3) I produce the two orders dated 24 June 1995;

A (4) *Syarikat Seng Lian Trading v Roy (Malaysia) Sdn Bhd* [1978] 1 MLJ 221;
(5) encl 44 should be before the judge as notice of appeal and not summons in chambers.

Encik Faiz Fadzil:

B (1) I am only raising issue of nullity on encls 44 and 48.

Court adjourns further decision to 9 October 1995.
(tt) (Dato Haji Abdul Malek bin Hj Ahmad)

9 Oktober 1995 DALAM KAMAR

C (kandungan 30) (perakuan segera)
(kandungan 44) (perakuan segera)
(kandungan 48)

Encik Faiz Fadzil mewakili defendan.
Encik Selva mewakili plaintif.

D Mahkamah :

Keputusan yang diberi pada 4 Oktober 1995 dikekalkan. Kandungan 44 dihantar balik ke penolong kanan pendaftar untuk sambung bicara terhadap garnisi kedua. Untuk garnisi pertama, defendan hendaklah membuat rayuan terhadap keputusan penolong kanan pendaftar. Mengenai kandungan 48
E ianya ditolak tanpa kos terhadap garnisi kedua dan dibenarkan tanpa kos terhadap garnisi pertama.

(tt) (Dato Haji Abdul Malek bin Hj Ahmad)

The court then asked Mr Selva a specific guestion which reads:

F On what basis did the court dismiss the application since clearly your clients were not the proper parties to the action when judgment was taken?

Mr Selva's response was that the plaintiff had submitted on s 35 of the Act in that the pre-incorporation contracts were ratified by the plaintiff after incorporation. He reiterated that this matter was fully argued before the
G learned judge. It was his submission that encl 59 and the supporting affidavit (encl 58) raised identical issues raised in encl 30 and the supporting affidavit (encl 29) which was decided upon by Abdul Malek Ahmad J. He relied on *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 AMR 2559 at pp 2572–2574 and contended that the principle of res judicata applied to preclude the defendants from re-agitating the same
H issue.

OBJECTIONS ON PROCEDURE

His second attack was procedural. It was his contention that the procedure adopted by the defendants in applying to set aside the writ of seizure and
I sale was wrong. He referred the court to O 47 r 1(1) of the RHC 1980 and contended that the only step the defendants ought to have taken was to stay the execution of the judgment or order. He argued that this court had no power to either strike out or to set aside the writ of seizure and sale.

DEFENDANT'S PRELIMINARY SUBMISSION

It was the submission of En Faiz for the defendants that when Abdul Malek bin Hj Ahmad J rejected his application for stay (encl 30) he had said clearly that since there was no appeal pending (as the Court of Appeal had already dismissed the defendants' application for leave to appeal to the Court of Appeal) there was no basis to continue with the hearing of encl 30. He contended that therefore the issue of locus standi of the plaintiff was not decided at that time.

At this stage since both parties were at diametrically opposed views on this, it became necessary for the court to read the minutes of the entry of the court file on 4 October 1995. I read aloud the minutes as produced above for both counsel to hear. The minutes showed that the learned judge did not make a decision even though he heard submissions and he dismissed the application on the basis that since there was no appeal there was no reason for a stay to be granted. It must be noted that the learned judge had heard arguments and reserved judgment. However, before he could decide the Court of Appeal had already dismissed the defendants' motion.

On this issue alone I decided that there was no question of the principle of res judicata being applicable and ruled against the plaintiff in its preliminary submission. I then called upon En Faiz to address me fully on his application.

DEFENDANTS' MAIN SUBMISSION

Encik Faiz pointed out that there was also no denial by the plaintiff that:

(1) there was no company called 'Afad Sha Sdn Bhd' at the commencement of these proceedings;

(2) judgments in default were taken on 26 November 1993 and 30 November 1993 against the first and second defendants respectively by a non-existent company;

(3) the name of another company had been changed to the name of the plaintiff; and

(4) that the other company had held an EGM on 22 May 1995 to change the name to 'Afad Sha Sdn Bhd', which was then approved by the ROC on 24 May 1995.

Encik Faiz submitted that based on these four facts it cannot be denied that the action had been commenced by a non-existent company. He referred me to s 16(5) of the Act which reads:

> On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as provided by this Act.

He therefore submitted that only after incorporation could the plaintiff sue and since they had sued prior to incorporation, the judgment obtained on which execution by way of seizure and sale was based was devoid of any solid legal basis. Since the judgment taken was a nullity, this writ of seizure and sale ought therefore to be struck out.

Encik Faiz then reviewed the facts which I have earlier narrated in extenso. In addition, En Faiz also elaborated on both the applications filed by him to the Court of Appeal for leave to appeal. The first application for leave was purely on the merits and no issue was taken as to the non-existence of the plaintiff at the time of suing. The Court of Appeal dismissed the application saying that it lacked merits. He then filed a second application to the Court of Appeal for leave and this time mentioned the fact of the non-existence of the plaintiff at the time of suing. He further submitted that the Court of Appeal had rejected this application as it felt that the earlier application had put paid to this issue — and since Abdul Malek Ahmad J had not decided on this issue, but merely dismissed the application on the basis that there was no longer an appeal, he was compelled to file this application, that is encl 59. At this point I have to state that Mr Selva did not object or dispute any of these facts as occurring before the Court of Appeal.

PLAINTIFF'S MAIN SUBMISSION

The main thrust of the plaintiff's argument was to question the rule or order under which encl 59 had been brought before this court. It was Mr Selva's argument that this court had no power to set aside a writ of seizure and sale at all unless there was a breach of the RHC 1980 in the issuance of the writ of seizure and sale or any proceedings subsequent to that.

The plaintiff relied on O 2 r 1 of the RHC 1980 and contended that any misgivings in respect of their conduct ought to be treated as an irregularity. If the court accepted the fact that there had been non-compliance of the requirements of the RHC 1980, only then can the court, it was argued, proceed to entertain an objection to set aside.

It was further argued on behalf of the plaintiff that nowhere in any of the affidavits was there a contention of non-compliance with O 46 or O 47 of the RHC 1980. Since there was no averment as to which rule of the above orders had been breached, it was argued by the plaintiff that encl 59 was totally misconceived. Mr Selva referred me to 17 *Halsbury's Laws of England* para 451 whch says:

> ... The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself. The special circumstances which entitle the court to stay execution of a money judgment are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness.

He further argued that this objection as to its locus standi cannot be raised during the writ of seizure and sale stage but that it ought to be raised at the substantial trial or at the hearing of the application to set aside. He contended that the defendants were estopped from re-agitating this same issue which had been disposed of with finality.

The plaintiff relied on s 23(6) of the Act to support its argument that the commencement of the suit had been continued by the new company after incorporation. Section 23(6) of the Act reads as follows:

> A change of name pursuant to this Act shall not affect the identity of the company or any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

To my mind, the fallacy of relying on s 23(6) is abundantly clear. If the plaintiff had been incoporated at time of commencement of this suit and then changed its name, pursuant to s 23(6) of the Act, the new company may continue the legal proceedings already commenced by the plaintiff — or if the plaintiff had been Afad Sdn Bhd which changed its name subsequently to Afad Sha Sdn Bhd, then the new company, ie Afad Sha Sdn Bhd may be deemed to have continued the proceedings commenced by Afad Sdn Bhd. As the facts stood, neither of the above two mentioned situations arose in this case and I accordingly held that s 23(6) does not help the plaintiff in any way.

The plaintiff also relied on s 35 of the Act. Section 35(1) provides as follows:

> Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.

He then relied on *Ford's Principles of Corporations Law* (6th Ed, 1992) and submitted that the cases relied on by the defendants cannot apply to this country because of s 35 of the Act as there was no equivalent provision in the English Companies Act 1948. He therefore submitted that the rule in *Kelner v Baxter* (1866) LR 2 CP 174 that there is no principle justifying inevitable creation of personal liability on a person who enters a contract for a 'principal' not yet in existence, continued to govern English decisions relating to the pre-incorporation contracts.

REPLY

In reply En Faiz referred me to *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khiun Fui* [1978] 2 MLJ 24 wherein Lee Hun Hoe CJ said at p 25:

> ... Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to its satisfaction to be vexatious or oppressive, or to constitute an abuse of its process. ...

A He also invited the court to apply O 92 r 4 of the RHC 1980. He also submitted that no resolution had been presented to show the said ratification, if any.

Although the plaintiff had no further right of reply, yet in the interest of justice I allowed Mr Selva a further reply.

B In the course of his reply he referred me to *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 and *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 and took the view that there is no longer a distinction between judgments that are a nullity or those that are irregular and that any judgment issued by the court ought to be obeyed and was to be treated as regular until set aside. He further C argued that the defendants ought to apply to set the judgment aside if there was a patent defect or an allegation of irregularity. The defendants cannot attack the judgment in collateral proceedings.

Upon consideration of the submissions, I find that the ratification of the pre-incorporation contract was neither pleaded nor averred in the D affidavits. Besides if this was the plaintiff's contention then para 1 of its statement of claim is totally misleading. In short, the plaintiff has been hoisted with his own petard.

In any event, the plaintiff cannot by any stretch of the imagination, however thinly it be stretched, satisfy the requirements as envisaged by E Lord Roskill in *Cosmic Insurance Corp Ltd v Khoo Chiang Poh* [1981] 1 MLJ 61 when his Lordship said at p 63:

> Their Lordships note three things about this subsection. First, so far as presently relevant before s 35(1) can be successfully invoked, the alleged 'contract or other transaction' must purport to have been entered into 'by any person on behalf of a company prior to its formation'. Secondly, it is F only after that first condition is satisfied that such a contract 'may be ratified by the company after its formation...' . Thirdly, it is only if both those conditions are satisfied that such a contract upon such ratification is ante-dated to the date when it first purported to have been made.

I hold that at the time of filing this suit there was in existence no juristic G entity capable of suing and by parity of reasoning this court ought to treat the entire proceedings as a nullity in the exercise of its inherent jurisdiction if the defendants were minded to apply to set aside the writ itself. For the moment, I have to confine myself to allowing this application to set aside this writ of seizure and sale which is based on a judgment which I consider H a nullity. I shall revert subsequently as to whether I can hold a judgment a nullity in collateral proceedings.

Russian & English Bank v Baring Brothers & Co Ltd [1935] 1 Ch 120, illustrates the position of a non-existent plaintiff and its right to sue. The facts (as found in the headnotes) are as follows:

I > A bank incorporated in Russia in 1910 established a branch in London in 1915. The bank was dissolved by the laws of Russia in January 1918. The London branch of the bank brought an action in 1921 to recover two sums of money alleged to be moneys of the plaintiff bank in the hands of the defendant bank. This action was stayed in 1932 by an order of the court ([1932] 1 Ch 435) on the ground that the plaintiff company no longer

existed. A compulsory winding-up order of the company was subsequently made under s 338 of the Companies Act 1929 and it was afterwards held by Bennett J ([1934] Ch 276) that s 338 did not operate to revive the plaintiff bank for the purposes of the action which had been stayed by order of the court in 1932. The liquidator having obtained the leave of the court brought an action under s 191 in the name and on behalf of the company to recover the same two sums of money.

Clauson J said at p 125:

> ... all I have to deal with is the present position, in which I have before me an action by a non-existent plaintiff.

and at p 126 he said:

> ... it seems to me to be impossible for me to hold that this non-existent plaintiff can, as matters stand, sue.

With respect, I agree with the above principle and applying it in the present case where the plaintiff was only incorporated on 24 June 1995, I hold that the plaintiff was non-existent and cannot sue. As such, the judgments in default obtained by it are a nullity.

IS THERE A DISTINCTION BETWEEN AN ORDER IRREGULARLY OBTAINED AND AN ORDER WHICH IS A NULLITY VIS-A-VIS ENFORCEMENT OF THE SAID ORDER?

In *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 Lord Denning whilst sitting in the Privy Council said this at pp 1172 and 1173:

> ... If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. ...

Then in *Re Pritchard* [1963] 1 All ER 873 the Court of Appeal again had the opportunity to review this distinction. The facts of the case were as follows:

> An originating summons under the Inheritance (Family Provision) Act 1938, was sealed in and issued out of the Pontypridd District Registry instead of the Central Office as required by RSC O 54 r 4B. The defendants entered appearances and did not take objection to the issue of the summons. The validity of the summons was subsequently raised by the district registrar; at that date the period within which proceedings under the Act of 1938 could be begun had expired. By RSC O 70 r 1, non-compliance with any rule of court did not render any proceedings void unless the court or judge so directed. There was no mention of an originating summons in the

A Supreme Court of Judicature (Consolidation) Act 1925, which, by s 225, defined an action as civil proceedings 'commenced by writ or in such other manner as may be prescribed by rules of court.' RSC O 54 r 4B, provided that an originating summons 'shall be sealed in the central office ... and when so sealed shall be deemed to be issued.

B In deciding the above case, Lord Upjohn was of the view that the authorities established three classes of proceedings which are nullities, viz (i) proceedings which ought to have been served but have never come to the notice of the defendant (but this does not include cases of substituted service or services by filing in default or cases where service has properly been dispensed with); (ii) proceedings which have never started at all C owing to some fundamental defect in issuing the proceedings; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement.

However Lord Denning who gave the dissenting judgment was of the view that there had not been any commencement of proceedings, for the D originating summons had not been issued out of the central office as required by the Rules of the Supreme Court ('the RSC') O 54 r 4B, which was in mandatory terms, and the originating summons was a nullity. There was not a mere irregularity but a fundamental defect, which the defendants could not waive, to which RSC O 70 r 1, did not apply, and for which no rule of court provided a remedy.

E It is interesting to note that it was after *Re Pritchard* [1963] 1 All ER 873 that the English RSC was amended to include a new O 2 r 2 which is in pari materia to our present O 2 r 1 (1) of the RHC 1980 which reads:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason F of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order the rein.

G In other words, cases such as *Re Pritchard* would no longer fall under the category of nullity.

In *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 the court relied on RSC O 2 r 1 and held that a failure to comply with a provision of the rule in the RSC did not render the application a nullity but H amounted only to an irregularity, unlike in *Re Pritchard* where for a similar reason the court held it to be a nullity and not an irregularity. Lord Denning MR said at pp 845 and 846:

> In my opinion, therefore, Blain J was in error, and so was James J. This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be I regarded as a irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that:
>
> > 'it is not possible ... for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation'.

> That could not be said in 1963; see *Re Pritchard* (decd); but it can be in 1966. The new rule does it.

When Lord Denning referred to doing away with the distinction between nullities and irregularities it must follow that he had confined himself to cases where the rules applied. In such instances no doubt O 2 r 1 puts paid to such distinction between nullities and irregularities. It was not meant to remove totally the distinction between nullities and irregularities. The misconception of learned counsel for the plaintiff in his understanding of *Harkness v Bell's Asbestos and Engineering Ltd* was further compounded when he relied on *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 and two other cases referred to in that case, namely *Isaacs v Robertson* [1984] 3 All ER 140 and *Hadkinson v Hadkinson* [1952] 2 All ER 567.

The principle that was laid down by the Supreme Court in *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100 was that a judgment whether one which was null and void or one which was irregular, was a good and enforceable judgment until set aside. The learned judge at p 17 of his judgment concluded that the judgment in default:

> ... was irregularly entered independent of the RHC 1980 and should be set aside ex debito justitiae.

As such, he held that since the judgment was a nullity the company had the option to ignore it or go to court to set aside. With respect, the Supreme Court reversed the decision of the learned judge and held that at p 101:

> ... the conclusion of the learned judge was in our view misconceived.

The Supreme Court at p 102 set out the correct legal position as follows:

> The default judgment in this case until set aside is a good and enforceable judgment. The correct law on this issue is as stated in *Isaacs v Robertson* [1984] 3 All ER 140, where the headnote reads:
>
> > 'Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinction between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside.'

In the speech of Lord Diplock (in *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843) reference was made to the passage in the judgment of Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at p 569:

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. ...

Since Mr Selva also relied on the two cases cited by the Supreme Court it is meet that I look into them.

In *Isaacs v Robertson* [1984] 3 All ER 140 the respondents obtained an injunction against the appellant to restrain the latter from trespassing on a parcel of land. No application to set aside the order granting the injunction had been made. The main attack by the appellant was based on the contention that as a consequence of the operation of O 24 r 11(1)(a) of the Rules of the Supreme Court of Saint Vincent, the order made by the High Court granting the interlocutory injunction was a nullity and that disobedience to it could not constitute a contempt of court. Lord Diplock in giving the decision of the court said at p 143:

> Their Lordships, would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the description 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in *Marsh v Marsh* [1945] AC 271 at 284 and *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169, [1962] AC 152; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall in a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind: what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have been drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

Isaacs v Robertson [1984] 3 All ER 140 followed the decision in *Hadkinson v Hadkinson* [1952] 2 All ER 567 where the Court of Appeal held that an order of a court of competent jurisdiction ought to be obeyed.

In *Standard Chartered Bank v Central Provident Fund Board* [1989] 1 MJL 268 the Court of Appeal of Singapore held that non-compliance with statutory requirements, going as it does to the root of the enforcement proceedings issued in the High Court, constitutes so fundamental a defect in procedure that it renders the entire proceedings in which it occurs, and any order made therein, a nullity. Likewise, in the present case the plaintiff was not incorporated pursuant to s 16(5) of the Act when the suit was filed and judgment taken. The judgment obtained by a non-existent company had formed the root of these present enforcement proceedings. Such

enforcement proceedings must naturally fail. My view is that following *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100, there is no distinction between an order which is a nullity and one which is irregular and curable under O 2 r 1(1) of the RHC 1980 in respect of enforcement of the orders as both orders may be enforced until and unless they are set aside whether in proceedings instituted for that purpose itself or whether in collateral proceedings. However, such orders may also be set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without the person affected by the order needing to have recourse to proceedings expressly meant for that purpose.

CAN PROCEEDINGS OR AN ORDER WHICH IS A NULLITY BE CHALLENGED IN COLLATERAL PROCEEDINGS?

Mr Selva vehemently argues that this court ought not at these proceedings, that is, at execution stage, look into the validity or otherwise of the judgments obtained. His submission was double-pronged. Firstly, he submitted that no collateral proceedings may be used to challenge an order properly obtained until it is set aside.

In a very recent decision, the Supreme Court in *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 472 had occasion to review the law relating to challenging an order of court by way of collateral proceedings. The facts of this case related to two appeals, one of which was Civil Appeal No 02–497–92. In this appeal the learned judge below upheld the order of the setting aside of a judgment in default of appearance dated 8 July 1986 obtained earlier by the plaintiff against the second defendant who was sued as guarantor in respect of money lent by the plaintiff to the first defendant. The second defendant had first applied to set aside the default judgment before the learned registrar and the learned registrar had allowed it to be set aside, and on appeal, the learned judge upheld the learned registrar's order as stated above.

The learned judge gave two main reasons for upholding the setting aside of the default judgment. The first reason was that the service on the second defendant by way of order for substituted service was bad in law 'because the order for substituted service was bad in law' and since the service effected in this manner was bad in law, the default judgment was also bad in law. It ought to be borne in mind that what came up for decision by both the learned registrar and the learned judge was for the setting aside of the default judgment and not for the order for substituted service or service in pursuant thereof to be set aside. The second reason was that the default judgment was for a sum for more than what was actually due. Peh Swee Chin FCJ in delivering the judgment of the Supreme Court said at p 477:

> For our part, with great respect we were unable to agree with the learned judge for deciding in this manner by brushing aside the order of substituted service, for the learned judge was obviously considering the validity of the order of substituted service of the High Court dated 5 January 1986 when the same order was not a subject matter of an application before the learned judge or for that matter, before the registrar earlier for its discharge. The

A order of substituted service of the High Court, a superior court of competent jurisdication, must be obeyed by everyone save in a few and rare exceptions and it can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity save in a very few rare exceptions, (such as a bankruptcy court going behind a B judgment of any court on credibly raised issues of collusion, fraud, etc only on hearing a bankruptcy petition), which all do not apply here. Please see *Pembinaan KSY v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100, SC; *Puah Bee Hong v Pentadbiran Tanah Daerah Wilayah Persekutuan & Anor (Teo Keng Tuan Robert, intervener) and anor appeal* [1994] 2 MLJ 601 and *Hadkinson v Hadkinson* [1952] 2 All ER 567. In this connection, it is C immaterial that the said order of the High Court was actually made by the learned registrar and not a High Court judge. The learned registrar should be considered notionally to be making the order as if he were a deputy High Court judge.

With great respect, the learned judge was making a similar error as the learned judge in *Pembinaan KSY v Lian Seng Properties Sdn Bhd* [1991] 1 D MLJ 100, by adjudicating on the validity of the order of substituted service not in actual proceedings filed for the very purpose of having the order for substituted service or service in pursuance thereof set aside.

However the learned judge went on to say at p 479:

We agreed, however, with the learned judge that the service and also order E of substituted service were bad in law; they were irregular for the following reason. There is an established old principle that if a writ cannot be served personally at the time when the writ is issued, there cannot be subsequently any substituted service of the same writ, see *Fry v Moore* (1889) 23 QBD 395, *Field v Bennett* (1886) 56 LJQB 89. But this was not the end of the matter, the question of waiver was raised and argued by the plaintiff.

F

What is of importance to note is that the case of *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor & Anor Appeal* [1995] 3 MLJ 472 did not deal with an order that was considered a nullity. The court very clearly held that the issue in question was one of irregularity. In the circumstances, I am respectfully of the view that the stricture regarding G challenge in collateral proceedings ought not to bind the defendants in the present case.

Alternatively, I hold that the judgments in default obtained by a non-existent company would clearly fall within the 'very few rare exceptions' envisaged by the Supreme Court. No doubt the Supreme Court gave some H examples as to when challenge by way of collateral proceedings could be made and I hold that the present situation by analogy would fall well within these few rare exceptions. Thus on the authority of *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor & Anor Appeal*, I hold that the defendants can challenge the judgments in default by way of collateral proceedings, namely by way of this application to set aside the I writ of seizure and sale.

I therefore hold that notwithstanding the fact that Abdul Malek Ahmad J had dismissed the application I am bound both by authority and the principle of ex debito justitiae to accept the submission of En Faiz during these collateral proceedings that the judgment obtained was a

nullity and I also hold that since the judgments obtained were a nullity it follows therefore that the writ of seizure and sale which allegedly took its breath of life from a dead source fails in limine and ought to be struck out and/or set aside.

The law is a living, breathing entity that draws it sustenance of life from the dictates of man's adaptability to his own chosen way of living. If I am to accept the submission of the plaintiff that the defendants, having failed to set side the judgment obtained against them, are to be precluded from challenging the validity or the very source of the said judgment, then indeed 'the law is an ass' as said by Charles Dickens in *Oliver Twist*. But that is not so. Justice must not only be done but be seen to be done. In its flexible and adaptable approach to the exigencies of situations the law from being dogmatic and rigid has accepted and adopted the principle of challenge in collateral proceedings.

Law is not a stultiloquent five-sensed animal. On the contrary it is created with a sense of purpose and imbued with the sixth sense of reason. From time immemorial the law of the land measured out justice with reason. It was not uncommon therefore that even where there seemed a dead-end in the law for a litigant, the law created legal fictions to overcome the obstinacy of man's rigid interpretation of that very same law itself. Law is reason and where injustice prevails the might and majesty of the law will grant redress to the needy and succour those in distress. No doubt therefore that it was appropriate and indeed right for the defendants in this case to challenge through the present collateral proceedings the very judgment which I hold was a nullity since I also find as a fact that Abdul Malek Ahmad J did not make a finding on the submissions made before him, ie whether the judgments in default ought to have been set aside on the grounds of nullity due to the fact that the plaintiff was not incorporated at the time the action was filed.

INHERENT JURISDICTION OF THE COURT

In *Che Wan Development Sdn Bhd v Co-operative Central Bank Bhd* [1989] 3 MLJ 40 NH Chan J (as his Lordship then was) held that the court had no inherent jurisdiction to grant a stay of execution beyond the jurisdiction given by certain statutes or rules of court. It is therefore appropriate at this stage to consider the procedural point taken by Mr Selva who contended that the defendants could only, pursuant to O 47 r 1(1) of the RHC 1980, apply for a stay of execution. However this fallacious submission of the plaintiff begs the question whether the defendants' application was under O 47 r 1(1). This is not the case. The application was not for a stay, but to strike out and/or set aside the writ of seizure and sale. The question of special circumstances does not in any way arise.

In any event in *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khiun Fui* [1978] 2 MLJ 24 at p 25 the then Federal Court said:

> ... Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all

A actions or proceedings which are shown to its satisfaction to be vexatious or oppressive, or to constitute an abuse of its process.

In any event, it is my considered view that the guideline set by Chua J in the *Hongkong & Shanghai Banking Corp v Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86 ought to apply. The B learned judge held that the court could hear a judgment debtor's application under its inherent powers and make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

ISSUE OF LOCUS STANDI

C I must also consider the argument of the defendants that the plaintiff had no locus standi. I hold that in the present case and in all cases relating to nullity when either the proceedings themselves or the judgment itself is to be impugned, then the court ought not to labour itself with considering this isssue of locus standi. The court's inherent power to set aside such proceedings and/or judgment ought to suffice. As to what locus standi is I D can do no better than to adopt and thus follow the views of Idris Yusoff J in *Tengku Jaffar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156 when he said at p 161:

> In Malaysia, the question of locus standi has been the subject of a series of judicial interpretations after considering a good number of English authorities E — it dates back to the English case of *Boyce v Paddington Borough Council* [1903] 1 Ch 109. In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, Abdul Hamid CJ (Malaya) (as he then was) elaborates on the concept of and the law on locus standi. He firmly says 'an action may not be brought to court by a stranger to it'. He also explains the various approaches that may be adopted by the court in deciding the question of locus standi. One F approach is to ask whether the plaintiff has 'a cause of action'. Another approach is to determine whether the plaintiff can establish a 'right' which the court may declare. Yet another approach is to require the plaintiff to demonstrate 'a special injury' resulting from the subject-matter of the declaration. A fourth approach requires the plaintiff to have an 'interest' in the subject-matter of the declaration to be litigated. A final approach leaves G the question of standing to be determined by the court in the exercise of its discretion.

I would hold that the plaintiff has failed each of the five tests enumerated by the learned judge.

I therefore allowed the defendants' application to strike out and/or to H set aside the writ of seizure and sale. Although the defendants had stated in their application that they intend to apply to strike out and to set aside the writ of seizure and sale I hold that the meaning and intent of either of the prayers is to prevent the plaintiff from executing a judgment that was a nullity. Whether it is to strike out or to set aside, the result is the same. The plaintiff's unjust conduct would be stopped.

I

After I had ruled against the plaintiff in this case, counsel for the plaintiff enquired of me if I was making an order for costs for issuing the writ of seizure and sale. Mr Selva insisted that he was entitled to costs for issuing the writ of seizure and sale since it was based on the judgments in default. However since I had ruled that the judgment itself was a nullity I

refused to make any order in respect of costs for the plaintiff for issuing the writ of seizure and sale, and instead ordered no order as to costs.

After I had delivered my judgment on 28 December 1995 I received a letter from the plaintiff's solicitors dated 29 December 1995 requesting for my grounds as the plaintiff had indicated his intention to appeal. However, the said letter put me on notice that one of the grounds of appeal was that there was an error on the face of the record.

As I could not see any logic or basis for such notice and thinking that I may have to deal with the said issue in my grounds of judgment, I directed my deputy registrar to write to the plaintiff's solicitors on 12 January 1996 as follows:

> Adalah saya diarah oleh Yang Arif Pesuruhjaya Kehakiman untuk merujuk kepada surat tuan SPCA6/01/92 bertarikh 29 December 1995.
>
> 2 Mahkamah ini tidak dapat memahami maksud tuan dalam perenggan ketiga surat tuan berkenaan dengan 'Error on the face of the record'. Oleh ini, sukacita sekiranya tuan dapat memberikan penjelasan berkenaan dengan perkara ini, sebelum Mahkamah ini dapat membekalkan tuan dengan nota-nota keterangan. Sekian, terima kasih.

There was no reply to the said letter. Since there was no reply and in order not to delay the grounds, I directed my deputy registrar to telephone the office of the plaintiff's solicitors on 18 January 1996. Subsequently Mr Selva replied vide his letter dated 20 January 1996. His written reply merely stated that the 'error on the face of the record' will be one of his grounds of appeal to the Court of Appeal and he included a page from *Administrative Law* by HWR Wade.

DUTY OF COUNSEL IN THE CONDUCT OF A TRIAL

It is the paramount duty of counsel to conduct his case on behalf of his client with utmost candour. Whilst the court will be prepared to overlook an indiscretion on the part of counsel due to lack of experience or want of deliberate misconduct, any act by a solicitor suggestive of a course of conduct that leads to no other inference than a deliberate attempt to mislead ought to bring forth the full wrath of the court.

Neither vaulting ambition nor a desire to succeed ought to motivate a solicitor to mislead. His paramount duty as an officer of the court is to project a course of conduct that is irreproachable. Counsel ought not to have insisted that Abdul Malek Ahmad J (as his Lordship then was) had decided on an issue when in fact his Lordship had not, thus necessitating much time spent in checking old records to verify the truth of the matter.

In the circumstances, based on the law and facts, I allowed the defendants' application to set aside the writ of seizure and sale with costs, and made no order of costs of the issuance of the writ of seizure and sale as prayed for by the plaintiff.

Application allowed.

Reported by T Vimalavathy